TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 258.

THE ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH A. DOW, ADMINISTRATOR OF SAMUEL J. DOW, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

FILED APRIL 8, 1895.

(15,863.)

(15,863.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 258.

THE ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH A. DOW, ADMINISTRATOR OF SAMUEL J. DOW, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ of error	3	2
Record	4	2
Petition of Samuel J. Dow	5	2
Order on petition	6	3
Petition of the Electric Company	6	3
Trial and verdict	9	5
Statement of facts in reserved case	9	5
Suggestion of death, &c.	10	6
Opinion	10	6
Judgment	12	7
Objections to addition of fifty per cent.	13	8
Order for stay of execution	13	8
Petition of Samuel J. Dow	14	8
Order on petition	15	9
Petition and order, with acknowledgment of service	16	10
Petition of the Electric Company	18	11
Verdict	21	13
Statement of facts in reserved case	22	13
Opinion of full court	23	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 14, 1896.

	Original.	Print.
Taxation of costs	25	15
Subpœna to Thomas J. Wiggins *et al.*	28	17
Leonard N. George	29	18
John M. Parker *et al.*	30	18
John A. Sheehan *et al.*	31	19
Objections to addition of fifty per cent. damages	32	19
Clerk's certificate to transcript of record	33	20
Chief justice's certificate to signature of clerk	33	20
Petition for writ of error	34	20
Assignment of errors	35	21
Order allowing writ of error	36	22
Citation	37	22
Proof of service of citation	37½	22
Clerk's certificate to transcript of record, &c.	38	23
Bond on writ of error	39	23

1 UNITED STATES OF AMERICA, *ss:*

Seal of Circuit Court, New Hampshire.

The President of the United States of America to the honorable the judges of the supreme court of the State of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The Electric Company, a corporation duly established by the laws of the said State of New Hampshire, doing business at Manchester, in the county of Hillsborough, in said State of New Hampshire, petitioner for writ of error, and Joseph A. Dow, of Manchester, administrator of Samuel J. Dow, late of Goffstown, in said county, appearing and opposing said petition for writ of error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of

2 or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Electric Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifteenth day of March, in the year of our Lord one thousand eight hundred and ninety-five.

FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States,
District of New Hampshire.

Allowed by—
C. DOE,
Chief Justice of the Supreme Court of New Hampshire.
1—258

	Original.	Print.
Taxation of costs	25	15
Subpœna to Thomas J. Wiggins *et al.*	28	17
Leonard N. George	29	18
John M. Parker *et al.*	30	18
John A. Sheehan *et al.*	31	19
Objections to addition of fifty per cent. damages	32	19
Clerk's certificate to transcript of record	33	20
Chief justice's certificate to signature of clerk	33	20
Petition for writ of error	34	20
Assignment of errors	35	21
Order allowing writ of error	36	22
Citation	37	22
Proof of service of citation	37½	22
Clerk's certificate to transcript of record, &c.	38	23
Bond on writ of error	39	23

1 UNITED STATES OF AMERICA, *ss:*

Seal of Circuit Court, New Hampshire.

The President of the United States of America to the honorable the judges of the supreme court of the State of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The Electric Company, a corporation duly established by the laws of the said State of New Hampshire, doing business at Manchester, in the county of Hillsborough, in said State of New Hampshire, petitioner for writ of error, and Joseph A. Dow, of Manchester, administrator of Samuel J. Dow, late of Goffstown, in said county, appearing and opposing said petition for writ of error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of

2 or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Electric Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifteenth day of March, in the year of our Lord one thousand eight hundred and ninety-five.

FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States,
District of New Hampshire.

Allowed by—
C. DOE,
Chief Justice of the Supreme Court of New Hampshire.

3 STATE OF NEW HAMPSHIRE, } ss.:
Hillsborough, }

And now here the judges of the supreme court of the State of New Hampshire, make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, Thomas D. Luce, clerk of said supreme court within and for the county of Hillsborough, have hereto set my hand and the seal of said court this fifteenth day of March, A. D. 1895.

[Seal Supreme Court, New Hampshire.]

THOS. D. LUCE, *Clerk.*

4 THE STATE OF NEW HAMPSHIRE, } ss.:
Hillsborough, }

At the trial term of the supreme court holden at Nashua, within and for said county of Hillsborough, on the third Tuesday of September, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Hon. William M. Chase, presiding justice.

5 JOSEPH A. DOW, Administrator of the Estate of Samuel J. Dow, Late of Goffstown, in said County, Deceased Since the Commencement of This Suit, Petitioner,

against

THE ELECTRIC COMPANY, a Corporation Duly Established by Law and Doing Business in Manchester, in said County, Defendant.

HILLSBOROUGH, *ss.:*

To the supreme court:

Respectfully represents Samuel J. Dow, of Goffstown, in said county, that he is seized and possessed of a certain tract of land situated in said Goffstown, bounded and described as follows, to wit: Beginning at the southeast corner of the premises, thence northerly by land of Samuel J. Dow and Joseph A. Dow to land of one Varnum; thence northerly by said Varnum land to the highway leading from Manchester, in said county, to Goffstown Centre, called the Goffstown back road; thence westerly by said highway to land of one Shepard; thence southerly by said Shepard land to the Piscataquog river; thence easterly down said river by land of Elizabeth Wyman and H. Byron Wyman, and down said river to the place of beginning; that the Electric Company, a corporation duly established by law and doing business in said Manchester, not ignorant thereof, have erected and for a long time, to wit, for one year last past, have kept up and maintained a dam across said river at Kelley's falls, so called in said Manchester, for the purpose of col-

lecting and detaining water to drive the wheels and machinery of said company, and thereby have, during all said time, caused the water detained by said dame to flow over, upon, and through said land to destroy the grass, crops, and trees thereon growing, to entirely submerge large tracts of said land, and to otherwise injure the same, to the petitioner's great damage and injury; that said petitioner, on the thirtieth day of July, A. D. 1891, and more than thirty days before the filing of this petition, duly notified
6 said company in writing of the damage done and being done by them as aforesaid, and therein requested them to satisfactorily adjust the same, but they have neglected and refused so to do.

Wherefore the said petitioner prays that his past, present, and future damages may be assessed and the said company ordered and decreed to pay the same to him, and for such other relief as may be just.

SAMUEL J. DOW,
By his solicitors, BURNHAM, BROWN & WARREN.

The foregoing petition was filed in the office of the clerk of said court on the 31st day of August, A. D. 1891, and thereupon it was ordered that said petitioner notify the said The Electric Company to appear at the next term of said court, to be held at Nashua, in said county of Hillsborough, on the third Tuesday of September, A. D. 1891, and show cause why the prayer of said petition should not be granted by causing the said The Electric Company to be served with an attested copy of said petition and this order thereon at least fourteen days before said third Tuesday of September, A. D. 1891, when and where said petition was entered, the parties appeared, and the petitioner elected a trial by jury, and said petition was continued to the March term, 1892, when the defendant filed the following petition, which was allowed, as an amendment:

HILLSBOROUGH, *ss.*:

To the supreme court:

Respectfully represents the Electric Company, a corporation duly established by the law- of New Hampshire and doing business in Manchester, in said county—

That it has legally purchased land on both sides of the Piscataquog river at Kelly's falls, so called, in said Manchester, including the river and falls, and has there erected a mill and placed wheels and machinery for the purpose of manufacturing or generat-
7 ing electricity to furnish light and power for houses, stores, and people in the said city of Manchester, and intends building or placing more wheels and machinery for the increase of power and furnishing further and more light for the use of the people of Manchester, and for the purpose of rendering the water power of said river at said falls available for the use of said mills and works, have there constructed a dam across said river and placed flashboards thereon as part of said dam at great expense.

That the construction of said mill and dam and machinery and placing flash-boards upon said dam to raise the water for working said mill and machinery and for creating a reservoir of water and for equalizing the flow of the same for the use of said mill and machinery is of public use and benefit to the people of this State, and that the same is necessary for the use of the mill and machinery for which it is designed.

That the flash-boards are of the width and height of three feet above the top of said dam, and shall not exceed one and one-half inches in thickness, supported against iron pins not exceeding one and one-half inches in diameter, standing in holes in the dam. Said flash-boards and pins are and shall be so made and placed that the water cannot rise to a height above the top of the boards exceeding one foot without bending the pins and removing the boards.

That Samuel J. Dow, of Goffstown, in said county, claims to be seized and possessed of a tract of land in said Goffstown bounded and described as follows, to wit: Beginning at the southeast corner of the premises, thence northerly by land of Samuel J. Dow and Joseph A. Dow to land of one Varnum; thence northerly by said Varnum's land to the highway leading from Manchester to Goffstown Centre called the Goffstown back road; thence westerly by said highway to land of one Shepherd; thence southerly by said Shepherd's land to the Piscataquog river; thence easterly down said river by land of Elizabeth Wyman and L. Byron Wyman and down said river to place of beginning.

8 And that by said dam so erected with such flash-boards everything on a portion of said land is overflowed and the green grass and soil of said premises injured, and the grass crops and trees thereon growing and so much of said land as is covered with water is to the injury and damage of the said Dow, as he claims.

Said Electric Company says that a portion of said land is overflowed by means of said dam and flash-boards, and that it is willing to pay reasonable damage for the same, but that it has not been able to agree upon any reasonable sum for the payment, past or future damage, to said real estate. Said Electric Company denies the title of said defendant.

Wherefore said Electric Company prays that the defendant prove his title; that a view of said premises may be had and the parties heard; that it may be determined by said court what and how much land of the defendant is overflowed, whether the construction of the mill, machinery, and the erection of said dam with said flash-boards forming part of the same as constructed by said corporation and the flowing of said land thereby to the depth and extent that the same may or can be flowed or otherwise injured by said dam and flash-boards is or may be of public use or benefit to the people of this State, and whether the same is necessary for the use of the mill and machinery already erected and that are designed to be erected and for which it was designed, and that the damages that have been done or may be done to said premises by the construction of said dam and the placing of flash-boards thereon as part

thereof may be assessed in accordance with the provisions of the statutes.

Your petitioner further shows that said Dow, at the September term, 1891, of the supreme court for this county, entered a suit which is now pending for damages as the dam then was; that said corporation, in accordance with its plans originally made and necessary to its business, subsequently, to wit, April 16th inst., in accordance with its original plans and as necessary for the proper
9 carrying on of its business, placed flash-boards on said dam as above set forth.

Wherefore your petitioner prays that there shall be one assessment of damages which shall cover all claims and injury, past and future, caused by the dam as now built with flash-boards, as above set forth.

THE ELECTRIC COMPANY,
By its att'y, DAVID CROSS.

And said petition was continued from term to term to the September term, 1893, when the parties appeared, and, issue being joined, — as well the parties by their counsel learned in the law as their witnesses, and, evidence being fully heard, the cause was committed to a jury sworn according to law to try the issue, to wit, John Q. Adams, foreman; Fred. McQuesten, Frank B. Hale, Clarence R. Russell, Alfred R. Tenney, Edward R. Sanderson, Henry Lewis, Sumner B. Chandler, John P. Teehan, Moses A. Dane, Charles H. Wyman, John W. Smith, who made return of their verdict thereon upon oath, and said: "The jury assesses the damages of the plaintiff in the sum of fifteen hundred dollars and no cents," and the petitioner moved that fifty per cent. be added to said verdict; to which the defendant objected; and certain questions of law arising upon said motion, objections, and exceptions, the same were reserved and assigned to the determination of the court at the next law term, as follows:

HILLSBOROUGH, *ss.*:

Supreme Court, September Term, 1893.

SAMUEL J. DOW
v.
THE ELECTRIC COMPANY.

ELECTRIC COMPANY
v.
SAMUEL J. DOW.

Petitions (1) by a land-owner and (2) by the mill-owner for assessment of damages under c. 142, Pub. Sts., known as the flowage act, filed prior to the enactment of c. 50, Laws of 1893.

Both parties elected trial by jury, and the petitions were tried together. Dow had a verdict. He moved the court to add fifty per cent. to it; to which the Electric Company objected, first, because

c. 142, so far as it requires the court to add fifty per cent. to
10 the verdict, is unconstitutional; and, second, because that part of said c. 142 requiring such addition to be made was repealed by c. 50, Laws of 1893, which is applicable to these petitions.

Before the case was opened for the company the court suggested to counsel the impropriety of making any reference to the addition of fifty per cent. to the verdict. In his opening statement counsel for company said: "The law not only gives compensation, it gives more." Dow's counsel excepted, and the court ruled the statement improper and stated to the jury that they could give only fair compensation. Counsel for company then proceeded with his opening substantially as follows: "I am sorry that I cannot state the whole law under the objection of my brother and the ruling of the court. I don't know how you can be made familiar with it unless you are familiar with the statute law of this State. The law gives full damages—full and running over, adequate and more than adequate—for the injuries inflicted;" to all which Dow excepted.

The questions arising upon the foregoing motion, objections, and exceptions are reserved.

I. N. BLODGETT,
Presiding Justice.

And said petition was continued to the January term, 1894, when the defendant appeared, and it was suggested to the court that the plaintiff was dead, and said petition was continued without costs to the May term, 1894, when the defendant appeared, and Joseph A. Dow, administrator of the estate of the said Samuel J. Dow, appeared to prosecute this petition, and thereafterwards, at the June law term of said court, the court rendered the following opinion:

4 Hills.: JUNE, '94.

DOW
v.
ELECTRIC CO.

Petitions by both parties, filed in 1891 and 1892, for the assessment of damages under the flowage act. Trial by jury and verdict for the plaintiff.

The plaintiff moved that fifty per cent. be added to the amount of the verdict. The defendants objected on the ground that
11 the provision of the statute requiring the addition is (1) unconstitutional and (2) has been repealed.

In his opening statement counsel for the defendants said: "The law not only gives compensation—it gives more." To this the plaintiff objected. The court ruled that the statement was improper, and told the jury they could only give fair compensation. Thereupon the defendants' counsel proceeded as follows: "I am sorry that I cannot state the whole law under the objection of my brother and the ruling of the court. I don't know how you can be made familiar with it unless you are familiar with the statute law of the

State. The law gives full damages, full and running over, adequate and more than adequate, for the injuries inflicted." The plaintiff excepted.

Burnham, Brown & Warren, for the plaintiff; D. Cross & Sulloway & Topliff, for the defendants.

CARPENTER, *J.*:

The question whether the statute requiring fifty per cent. to be added to the damages estimated by the committee or assessed by the jury (Pub. Sts., c. 142, ss. 16 & 17) is repealed by the act of March 30, 1893 (Laws 1893, c. 50), need not be determined. The plaintiff's petition for the assessment of the damages was filed August 31, 1891, and the defendants' like petition in March, 1892. A subsequent repeal of the statute could not effect the decision of the cause in this particular. Bill of rights, art. 23; Woart *v.* Winnick, 3 N. H., 473; Dow *v.* Norris, 4 N. H., 16; Willey *v.* Epping, 16 N. H., 58; Towle *v.* Railroad, 18 N. H., 547; Smart *v.* Railroad, 20 N. H., 233; Rich *v.* Falnders, 39 N. H., 304; Kent *v.* Gray, 53 N. H., 576.

When a legislative grant of authority to exercise the power of eminent domain contains a condition that the grantee shall pay more than the value of the property taken under the power, the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition. The defendants were authorized to flow the plaintiff's land upon the condition, among others, that they pay the damages thereby done to
12 him and fifty per cent. in addition. Pub. Sts., c. 142, ss. 12, 18. The statute is permissive. It confers a privilege which the defendants were at liberty to exercise or not as they saw fit. But they cannot take and enjoy the benefit without performing the condition on which it is given. By their exercise of the power conferred, flowing the plaintiff's land and applying for an assessment of the damages, they are precluded from denying the validity of the condition. The question of its constitutionality under either the Federal or State constitution is not open to them. Pitkin *v.* Springfield, 112 Mass., 509; Deverson *v.* Railroad, 58 N. H., 129, 131, and cases cited; Dodge *v.* Stickney, 61 N. H., 607, 610, 611; People *v.* Murray, 5 Hill, 468, 472. The defendants' objection that the statute is in conflict with both constitutions or either of them is overruled.

The remarks of the defendants' counsel related, not to the facts of the case, but to the law. They could not have injured the plaintiff if the jurors knew that fifty per cent. was to be added to their verdict. If the jurors did not know that their verdict was to be so increased, the counsel did not inform them, and his statements, if they had any effect, would seem quite as likely to operate in favor of the plaintiff as against him.

Exceptions overruled.

Blodgett, J., did not sit. The others concurred.

And thereupon said questions of law were returned to the trial term with an order that the exceptions be overruled, and said peti-

tion was continued to this term, when the parties appear and the court ordered judgment on the verdict.

It is therefore considered by the court that the petitioner, administrator as aforesaid, recover against the defendant two thousand four hundred sixteen dollars and fifty cents, damages, and costs of suit, taxed at one hundred seventy-three dollars and twenty-one cents.

It is further ordered by the court that judgment be rendered as of December 31, 1894.

And thereupon the defendant filed the following objections:

13 HILLSBOROUGH, *ss:*

Supreme Court, Sept. Term, 1894.

SAMUEL J. DOW
v.
THE ELECTRIC COMPANY.

The defendant objects to the addition of the fifty per cent. by the court to the verdict of the jury because the statute authorizing this is in contravention of the Constitution of the United States as follows, viz:

It violates the provision of article fifth of the amendment which provides that "no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

It violates also article 7th of the same amendment, which provides that "in suits at common law, when the value in controversy exceed- twenty dollars, the right of trial by jury shall be preserved."

Also it violates section one of the 14th amendment, which provides "nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

ELECTRIC CO.,
By its att'ys, SULLOWAY & TOPLIFF &
DAVID CROSS.

And thereupon it is ordered by the court that execution be stayed pending application to the Supreme Court of the United States for a writ of error.

Attest: THOS. D. LUCE, *Clerk.*

14 HILLSBOROUGH, *ss:*

To the supreme court:

Respectfully represents Samuel J. Dow, of Goffstown, in said county, that he is seized and possessed of a certain tract of land situated in said Goffstown, bounded and described as follows, to wit: Beginning at the southeast corner of the premises, thence northerly by land of Samuel J. Dow and Joseph A. Dow to land of one Varnum; thence northerly by said Varnum land to the highway

leading from Manchester, in said county, to Goffstown Centre, called the Goffstown back road; thence westerly by said highway to land of one Shepard; thence southerly by said Shepard land to the Piscataquog river; thence easterly down said river by land of Elizabeth Wyman and H. Byron Wyman, and down said river to the place of beginning; that the Electric Company, a corporation duly established by law and doing business in said Manchester, not ignorant thereof, have erected and for a long time, to wit, for one year last past, have kept up and maintained a dam across said river at Kelley's falls, so called, in said Manchester, for the purpose of collecting and detaining water to drive the wheels and machinery of said company, and thereby have during all said time caused the water detained by said dam to flow over, upon, and through said land, to destroy the grass, crops, and trees thereon growing, to entirely submerge large tracts of said land, and to otherwise injure the same, to the petitioner's great damage and injury; that said petitioner on the thirtieth day of July, A. D. 1891, and more than thirty days before the filing of this petition, duly notified said company in writing of the damage done and being done by them, as aforesaid, and therein requested them to satisfactorily adjust the same, but they have neglected and refused so to do.

Wherefore the said petitioner prays that his past, present, and future damages may be assessed and the said company ordered and decreed to pay the same to him, and for such other relief as may be just.

SAMUEL J. DOW,
By his solicitors, BURNHAM, BROWN & WARREN.

15 STATE OF NEW HAMPSHIRE, } *ss:*
Hillsborough, }

In the Supreme Court.

This petition having been filed in the office of the clerk of said court this 31st day of August, A. D. 1891—

It is ordered that said petitioner notify the said The Electric Company to appear at the next term of said court, to be held at Nashua, in said county of Hillsborough, on the third Tuesday of September, A. D. 1891, and show cause why the prayer of said petition should not be granted by causing the said The Electric Company to be served with an attested copy of said petition and this order thereon at least fourteen days before said third Tuesday of September, A. D. 1891.

THOS. D. LUCE, *Clerk.*

Burnham, Brown & Warren, Esquires, att'ys for petitioner.

[Endorsed:] Petition for assessment of damages. Samuel J. Dow *v.* The Electric Co. Supreme court. Hillsborough, *ss:* Filed Aug. 31, 1891. Thos. D. Luce, clerk.

tion was continued to this term, when the parties appear and the court ordered judgment on the verdict.

It is therefore considered by the court that the petitioner, administrator as aforesaid, recover against the defendant two thousand four hundred sixteen dollars and fifty cents, damages, and costs of suit, taxed at one hundred seventy-three dollars and twenty-one cents.

It is further ordered by the court that judgment be rendered as of December 31, 1894.

And thereupon the defendant filed the following objections:

13 HILLSBOROUGH, *ss:*

Supreme Court, Sept. Term, 1894.

SAMUEL J. DOW
v.
THE ELECTRIC COMPANY.

The defendant objects to the addition of the fifty per cent. by the court to the verdict of the jury because the statute authorizing this is in contravention of the Constitution of the United States as follows, viz:

It violates the provision of article fifth of the amendment which provides that "no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

It violates also article 7th of the same amendment, which provides that "in suits at common law, when the value in controversy exceed- twenty dollars, the right of trial by jury shall be preserved."

Also it violates section one of the 14th amendment, which provides "nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

ELECTRIC CO.,
By its att'ys, SULLOWAY & TOPLIFF &
DAVID CROSS.

And thereupon it is ordered by the court that execution be stayed pending application to the Supreme Court of the United States for a writ of error.

Attest: THOS. D. LUCE, *Clerk.*

14 HILLSBOROUGH, *ss:*

To the supreme court:

Respectfully represents Samuel J. Dow, of Goffstown, in said county, that he is seized and possessed of a certain tract of land situated in said Goffstown, bounded and described as follows, to wit: Beginning at the southeast corner of the premises, thence northerly by land of Samuel J. Dow and Joseph A. Dow to land of one Varnum; thence northerly by said Varnum land to the highway

leading from Manchester, in said county, to Goffstown Centre, called the Goffstown back road; thence westerly by said highway to land of one Shepard; thence southerly by said Shepard land to the Piscataquog river; thence easterly down said river by land of Elizabeth Wyman and H. Byron Wyman, and down said river to the place of beginning; that the Electric Company, a corporation duly established by law and doing business in said Manchester, not ignorant thereof, have erected and for a long time, to wit, for one year last past, have kept up and maintained a dam across said river at Kelley's falls, so called, in said Manchester, for the purpose of collecting and detaining water to drive the wheels and machinery of said company, and thereby have during all said time caused the water detained by said dam to flow over, upon, and through said land, to destroy the grass, crops, and trees thereon growing, to entirely submerge large tracts of said land, and to otherwise injure the same, to the petitioner's great damage and injury; that said petitioner on the thirtieth day of July, A. D. 1891, and more than thirty days before the filing of this petition, duly notified said company in writing of the damage done and being done by them, as aforesaid, and therein requested them to satisfactorily adjust the same, but they have neglected and refused so to do.

Wherefore the said petitioner prays that his past, present, and future damages may be assessed and the said company ordered and decreed to pay the same to him, and for such other relief as may be just.

SAMUEL J. DOW,
By his solicitors, BURNHAM, BROWN & WARREN.

15 STATE OF NEW HAMPSHIRE, *Hillsborough*, } *ss.*:

In the Supreme Court.

This petition having been filed in the office of the clerk of said court this 31st day of August, A. D. 1891—

It is ordered that said petitioner notify the said The Electric Company to appear at the next term of said court, to be held at Nashua, in said county of Hillsborough, on the third Tuesday of September, A. D. 1891, and show cause why the prayer of said petition should not be granted by causing the said The Electric Company to be served with an attested copy of said petition and this order thereon at least fourteen days before said third Tuesday of September, A. D. 1891.

THOS. D. LUCE, *Clerk.*

Burnham, Brown & Warren, Esquires, att'ys for petitioner.

[Endorsed:] Petition for assessment of damages. Samuel J. Dow *v.* The Electric Co. Supreme court. Hillsborough, *ss.*: Filed Aug. 31, 1891. Thos. D. Luce, clerk.

16 HILLSBOROUGH, *ss*:

To the supreme court:

Respectfully represents Samuel J. Dow, of Goffstown, in said county, that he is seized and possessed of a certain tract of land situated in said Goffstown, bounded and described as follows, to *wit*: Beginning at the southeast corner of the premises, thence northerly by land of Samuel J. Dow and Joseph A. Dow to land of one Varnum; thence northerly by said Varnum land to the highway leading from Manchester, in said county, to Goffstown Centre, called the Goffstown back road; thence westerly by said highway to land of one Shepard; thence southerly by said Shepard land to the Piscataquog river; thence easterly down said river by land of Elizabeth Wyman and H. Byron Wyman, and down said river to the place of beginning; that the Electric Company, a corporation duly established by law and doing business in said Manchester, not ignorant thereof, have erected and for a long time, to wit, for one year last past, have kept up and maintained a dam across said river at Kelley's falls, so called, in said Manchester, for the purpose of collecting and detaining water to drive the wheels and machinery of said company, and thereby have, during all said time, caused the water detained by said dam to flow over, upon, and through said land, to destroy the grass, crops, and trees thereon growing, to entirely submerge large tracts of said land, and to otherwise injure the same, to the petitioner's great damage and injury; that said petitioner, on the thirtieth day of July, A. D. 1891, and more than thirty days before the filing of this petition, duly notified said company in writing of the damage done and being done by them as aforesaid, and therein requested *them* to satisfactorily adjust the same, but they have neglected and refused so to do.

Wherefore the said petitioner prays that his past, present, and future damages may be assessed and the said company ordered and decreed to pay the same to him, and for such other relief as may be just.

SAMUEL J. DOW,
By his solicitors, BURNHAM, BROWN & WARREN.

17 STATE OF NEW HAMPSHIRE, *Hillsborough*, } *ss*:

In the Supreme Court.

This petition having been filed in the office of the clerk of said court this 31st day of August, A. D. 1891—

It is ordered that said petitioner notify the said The Electric Company to appear at the next term of said court, to be held at Nashua, in said county of Hillsborough, on the third Tuesday of September, A. D. 1891, and show cause why the prayer of said petition should not be granted by causing the said The Electric Company to be served with an attested copy of said petition and this

order thereon at least fourteen days before said third Tuesday of September, A. D. 1891.

THOS. D. LUCE, *Clerk.*

Burnham, Brown & Warren, Esquires, att'ys for petitioner.

The foregoing is a true copy of a petition filed as aforesaid and of the order of notice thereon.

Attest: THOS. D. LUCE, *Clerk.*

[Endorsed:] Petition. Dow *v.* The Electric Co. Copy. Hillsborough, *ss:* August 31st, 1894. The Electric Company hereby acknowledges due and legal service of the within copy and waives all further notice of the suit, and also waives all prior notice and all defects of prior notice of the plaintiff's damage and injury. The Electric Company, by its att'y, David Cross.

18 HILLSBOROUGH, *ss:*

To the supreme court:

Respectfully represents the Electric Company, a corporation duly established by the law of New Hampshire and doing business in Manchester, in said county—

That it has legally purchased land on both sides of the Piscataquog river at Kelly's falls, so called, in said Manchester, including the river and falls, and has there erected a mill and placed wheels and machinery for the purpose of manufacturing or generating electricity to furnish light and power for houses, stores, and people in the said city of Manchester, and intends building or placing more wheels and machinery for the increase of power and furnishing further and more light for the use of the people of Manchester, and for the purpose of rendering the water power of said river at said falls available for the use of said mills and works have there constructed a dam across said river and placed flash-boards thereon as part of said dam at great expense.

That the construction of said mill and dam and machinery and placing flash-boards upon said dam to raise the water for working said mill and machinery and for creating a reservoir of water and for equalizing the flow of the same for the use of said mill and machinery is of public use and benefit to the people of this State, and that the same is necessary for the use of the mill and machinery for which it is designed.

That the flash-boards are of the width and height of three feet above the top of said dam and shall not exceed one and one-half inches in thickness, supported against iron pins not exceeding one and one-half inches in diameter, standing in holes in the dam. Said flash boards and pins are and shall be so made and placed that the water cannot rise to a height above the top of the boards exceeding one foot without bending the pins and removing the boards.

19 That Samuel J. Dow, of Goffstown, in said county, claims to be seized and possessed of a tract of land in said Goffstown bounded and described as follows, to wit:

Beginning at the southeast corner of the premises, thence northerly by land of Samuel J. Dow and Joseph A. Dow to land of one Varnum; thence northerly by said Varnum's land to the highway leading from Manchester to Goffstown Centre, called the Goffstown back road; thence westerly by said highway to land of one Shepherd; thence southerly by said Shepherd's land to the Piscataquog river; thence easterly down said river by land of Elizabeth Wyman and L. Byron Wyman and down said river to place of beginning.

And that by said dam so erected with such flash-boards everything on a portion of said land is overflowed and the green grass and soil of said premises injured, and the grass crops and trees thereon growing and so much of said land as is covered with water is to the injury and damage of the said Dow, as he claims.

Said Electric Company says that a portion of said land is overflowed by means of said dam and flash-boards, and that it is willing to pay reasonable damage for the same, but that it has not been able to agree upon any reasonable sum for the payment, past or future damage, to said real estate. Said Electric Company denies the title of said defendant.

Wherefore said Electric Company prays that the defendant prove his title; that a view of said premises may be had and the parties heard; that it may be determined by said court what and how much land of the defendant is overflowed; whether the construction of the mill, machinery, and the erection of said dam, with said flash-boards forming part of the same, as constructed by said corporation, and the flowing of said land thereby to the depth and extent that the same may or can be flowed or otherwise injured by said dam and flash-boards is or may be of public use or benefit to the people of this State, and whether the same is necessary for the use of the mill and machinery already erected and that are designed to be erected and for which it was designed, and that the damages that have been done or may be done to said premises by the construction of said dam and the placing of flash-boards thereon as part thereof may be assessed in accordance with the provision of the statutes.

Your petitioner further shows that said Dow, at the September term, 1891, of the supreme court for this county, entered a suit, which is now pending, for damages as the dam then was; that said corporation, in accordance with its plans originally made and necessary to its business, subsequently, to wit, April 16th inst., in accordance with its original plans and as necessary for the proper carrying on of its business, placed flash-boards on said dam as above set forth.

Wherefore your petitioner prays that there shall be one assessment of damages, which shall cover all claims and injury, past and future, caused by the dam as now built with flash-boards, as above set forth.

THE ELECTRIC COMPANY,
By its att'y, DAVID CROSS.

[Endorsed:] Electric Company *vs.* Samuel J. Dow.

21 HILLSBOROUGH, *ss:*

Supreme Court, September Term, 1893.

SAMUEL J. DOW
v.
THE ELECTRIC CO.

The jury assesses the damages of the plaintiff in the sum of fifteen hundred dollars and no cents.

JOHN Q. ADAMS, *Foreman.*

[Endorsed:] Verdict. Samuel J. Dow *v.* The Electric Co. Filed Octo. 6, '93.

22 HILLSBOROUGH, *ss:*

Supreme Court, September Term, 1893.

SAMUEL J. DOW
v.
THE ELECTRIC COMPANY.

ELECTRIC COMPANY
v.
SAMUEL J. DOW.

Petitions, (1) by a land-owner, and (2) by the mill-owner, for assessment of damages under c. 142 Pub. Sts. known as the flowage act, filed prior to the enactment of c. 50, Laws of 1893.

Both parties elected trial by jury, and the petitions were tried together. Dow had a verdict. He moved the court to add fifty per cent. to it, to which the Electric Company objected, first, because c. 142, so far as it requires the court to add fifty per cent. to the verdict is unconstitutional; and second, because that part of said c. 142, requiring such addition to be made, was repealed by c. 50, Laws of 1893, which is applicable to these petitions.

Before the case was opened for the company, the court suggested to counsel the impropriety of making any reference to the addition of fifty per cent. to the verdict. In his opening statement counsel for company said, "The law not only gives compensation—it gives more." Dow's counsel excepted, and the court ruled the statement improper and stated to the jury that they could give only fair compensation. Counsel for company then proceeded with his opening substantially as follows: "I am sorry that I cannot state the whole law under the objection of my brother and the ruling of the court. I don't know how you can be made familiar with it unless you are familiar with the statute law of this State. The law gives full damages, full and running over, adequate and more than adequate, for the injuries inflicted;" to all which Dow excepted.

The questions arising upon the foregoing motion, objections and exceptions are reserved.

I. N. BLODGETT,
Presiding Justice.

[Endorsed:] Hillsborough. Case. Dow *v.* Electric Company. Electric Company *v.* Dow. B. B. W. for Dow. Cross, S. & T. for Electric Co. Copies dis. Apr. 10, 1894.

23 4 Hills. JUNE, '94.

DOW
v.
ELECTRIC CO.

Petitions by both parties filed in 1891 and 1892 for the assessment of damages under the flowage act. Trial by jury and verdict for the plaintiff.

The plaintiff moved that fifty per cent. be added to the amount of the verdict. The defendants objected on the ground that the provision of the statute requiring the addition is (1) unconstitutional and (2) has been repealed.

In his opening statement counsel for the defendants said: "The law not only gives compensation; it gives more." To this the plaintiff objected. The court ruled that the statement was improper and told the jury they could give only fair compensation. Thereupon the defendants' counsel proceeded as follows: "I am sorry that I cannot state the whole law under the objection of my brother and the ruling of the court. I don't know how you can be made familiar with it unless you are familiar with the statute law of the State. The law gives full damages, full and running over, adequate and more than adequate, for the injuries inflicted." The plaintiff excepted.

Burnham, Brown & Warren for the plaintiff.

D. Cross & Sulloway & Topliff for the defendants.

CARPENTER, *J.*:

The question whether the statute requiring fifty per cent. to be added to the damages estimated by the committee or assessed by the jury (Pub. Sts., c. 142, ss. 16 & 17) is repealed by the act of March 30, 1893 (Laws 1893, c. 50), need not be determined. The plaintiff's petition for the assessment of the damages was filed August 31, 1891, and the defendants' like petition in March, 1892. A subsequent repeal of the statute could not effect the decision of the cause in this particular. Bill of rights, art. 23; Woart *v.* Winnick,
3 N. H., 473; Dow *v.* Norris, 4 N. H., 16; Willey *v.* Epping,
24 16 N. H., 58; Towle *v.* Railroad, 18 N. H., 547; Smart *v.* Railroad, 20 N. H., 233; Rich *v.* Flanders, 39 N. H., 304; Kent *v.* Gray, 53 N. H., 576.

When a legislative grant of authority to exercise the power of eminent domain contains a condition that the grantee shall pay more than the value of the property taken under the power the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition. The defendants were authorized to flow the plaintiff's land upon the condition, among others, that they pay the damages thereby done to him and fifty per cent. in addition. Pub. Sts., c. 142, ss. 12, 18. The statute is

permissive. It confers a privilege which the defendants were at liberty to exercise or not as they saw fit. But they cannot take and enjoy the benefit without performing the condition on which it is given. By their exercise of the power conferred, flowing the plaintiff's land and applying for an assessment of the damages, they are precluded from denying the validity of the condition. The question of its constitutionality under either the Federal or State constitution is not open to them. Pitkin *v.* Springfield, 112 Mass., 509; Deverson *v.* Railroad, 58 N. H., 129, 131, and cases cited; Dodge *v.* Stickney, 61 N. H., 607, 610, 611; People *v.* Murray, 5 Hill, 468, 472. The defendants' objection that the statute is in conflict with both constitutions or either of them is overruled.

The remarks of the defendants' counsel related, not to the facts of the case, but to the law. They could not have injured the plaintiff if the jurors knew that fifty per cent. was to be added to their verdict. If the jurors did not know that their verdict was to be so increased, the counsel did not inform them, and his statements, if they had any effect, would seem quite as likely to operate in favor of the plaintiff as against him.

Exceptions overruled.

Blodgett, J., did not sit: the others concurred.

25 Burnham, Brown & Warren, attorneys-at-law, No. 27 Opera House block.

MANCHESTER, N. H., *Sept.* 17, 1894.

BRO. LUCE: We enclose taxation of costs in Dow *v.* Electric Co. You will notice that the sworn statement of H. Byron Wyman and the subpœnas enclosed cover all the witnesses. Kindly send execution.

Verdict	$1,500
50% to be added	750
Costs	168 71
Int., Oct. 6, '93, to Sept. 18, '94	137 86
Am't of ex'on	$2,556 57

Very truly, BURNHAM, BROWN & WARREN.

To Thos. D. Luce, Esq., Nashua, N. H.

Burnham, Brown & Warren, attorneys-at-law, No. 27 Opera House block.

MANCHESTER, N. H., *Dec.* 17, 1894.

BRO. LUCE: If ex'on had issued in Dow *v.* Electric Co. Sept. 17, '94, it would have been for $2,556 57

Int., Sept. 17, '94, to Dec. 17, '94	38 34
Sept. term, 1894, tr. & att.	4 50
It now should be	$2,599 41

Kindly send ex'on for this am't.

Very truly, BURNHAM, BROWN & WARREN.

26 HILLSBOROUGH, *ss:*

Supreme Court.

SAMUEL J. DOW
v.
THE ELECTRIC CO.

Plaintiff's Costs.

Notice	$1 00
Service	1 62
Petition	1 00
Entry and copies	3 20
Att'y fee	1 00
Tr. and att., Sept. term, 1891	4 50
" " March term, 1892	3 50
" " Sept. term, 1892	4 50
" " March term, 1893	3 50
" " Sept. term, 1893	11 50
" " Jan'y term, 1894	3 50
" " May term, 1894	3 50
Jury fee	5 00
Paid expenses of jury at view	6 00
Summoning witnesses	5 12
Subpœnas	40
	$58 84
Witness fees from next page	109 87
	$168 71

BURNHAM, BROWN & WARREN,
Pl'ff's Att'ys.

27 Witnesses:

George H. Allen,	1	day,	18	miles		3 31
Lewellyn T. Barnard,	4	"	22	"		7 64
Clinton H. Tirrell,	4	"	22	"		7 64
Leonard N. George,	2	"	22	"		5 14
John Irwin,	1	"	18	"		3 31
Henry H. Johnson,	1	"	23	"		4 01
James F. Wyman,	4	"	18	"		7 01
John M. Parker,	1	"	28	"		4 61
Lucien W. Bartlett,	4	"	22	"		7 64
Charles C. Hayes,	1	"	18	"		3 31
Thos. J. Wiggin,	1	"	21	"		3 37
E. Payson French,	1	"	21	"		3 77
Andrew J. Hazen,	4	"	23	"		7 76
George W. Fellows,	4	"	23	"		7 76
Thos. O. Knowlton,	1	"	29	"		4 73
H. Byron Wyman,	4	"	23	"		7 76

John A. Sheehan,	1 day,	18	miles.....	3 31
Willard T. Watson,	3 "	23	"	6 51
Harry E. Dow,	3 "	21	"	6 27
John W. Hoitt,	1 "	28	"	4 61
				109 87

STATE OF NEW HAMPSHIRE, } *ss:*
Hillsborough, }

SEPT. 15, 1894.

Personally appeared the above-named H. Byron Wyman and made oath that said Barnard, Tirrell, Johnson, Jas. F. Wyman, Bartlett, Hazen, Fellows, Knowlton, Watson, Dow, and H. Byron Wyman attended the trial of said case the number of days and travelled the number of miles set opposite their names respectively.

Before me—

ALBERT O. BROWN,
Justice of the Peace.

[Endorsed:] Costs. Dow *v.* Electric Co. Sam'l J. Dow *v.* Electric Company. Pl'ff's costs. Supreme court. Hillsborough, *ss:* Filed Sep. 18, 1894. Thos. D. Luce, clerk. 491-9.

28 *Subpœna.*

[SEAL.] THE STATE OF NEW HAMPSHIRE, } *ss:*
Hillsborough, }

To Thomas J. Wiggins, Warren G. Currier, and E. Payson French:

You are required to appear before the supreme court, at the supreme court room, in Nashua, in said county, on the 4th day of October, 1893, at nine o'clock in the forenoon, to testify what you know relating to a petition for the assessment of damages to be heard and tried betwixt Samuel J. Dow and The Electric Co.

Hereof fail not, as you will answer your default under the penalties prescribed by law.

Dated at Manchester, N. H., Oct. 2, 1893.

ALBERT O. BROWN,
Justice of the Peace.

[Endorsed:] Hillsborough, *ss:* Oct. 2, '93. I this day summoned the within-named Thomas J. Wiggin and E. Payson French, as directed, by reading to each of them this writ and paying to each of them the fees prescribed by law for their travel and attendance. Charles H. Hodgman, deputy sheriff.

Fees.

Serv.....	50
Travel	72
P'd witness	7 30
	8 52

29 *Subpœna.*

[SEAL.] THE STATE OF NEW HAMPSHIRE, } *ss:*
Hillsborough, }

To Leonard N. George:

You are required to appear before the supreme court, at the court-house, in Nashua, in said county, on the 4th day of October, 1893, at nine o'clock in the forenoon, to testify what you know relating to a petition for assessment of damages to be heard and tried betwixt Samuel J. Dow and The Electric Co.

Hereof fail not, as you will answer your default under the penalties prescribed by law.

Dated at Manchester, N. H., October 2d, 1893.

ALBERT O. BROWN,
Justice of the Peace.

[Endorsed:] Hillsborough, *ss:* Oct. 3, 1893. I this day summoned the within-named Leonard N. George, as directed, by reading to him this writ and paying to him the fees prescribed by law for his travel and attendance. Charles H. Hodgman, deputy sheriff.

Fees.

Serv.	25
Travel	1 45
P'd witness	3 90
	$5 60

491–10.

30 *Subpœna.*

[SEAL.] THE STATE OF NEW HAMPSHIRE, } *ss:*
Hillsborough, }

To John M. Parker and John W. Hoitt:

You are required to appear before the supreme court, at the court-house, in Nashua, in said county, on the 4th day of October, 1893, at nine o'clock in the forenoon, to testify what you know relating to a petition for assessment of damages to be heard and tried betwixt Samuel J. Dow and The Electric Company.

Hereof fail not, as you will answer your default under the penalties prescribed by law.

Dated at Manchester, N. H., Sept. 25, 1893.

ALBERT O. BROWN,
Justice of the Peace.

[Endorsed:] Hillsborough, *ss:* October 3rd, 1893. I have this day summoned the within-named John M. Parker and John W. Hoitt by reading to each of them this subpœna and paying them their fees. Wallace Caldwell, deputy sheriff.

Fees.

2 services	50
Travel	72
Paid witnesses	9 22
	$10 44

31 *Subpœna.*

[SEAL.] THE STATE OF NEW HAMPSHIRE, } *ss:*
Hillsborough, }

To John A. Sheehan and Charles C. Hayes:

You are required to appear before the supreme court, at the court-house, at Nashua, in said county, on the 4th day of October, 1893, at 11.30 o'clock in the forenoon, to testify what you know relating to a petition for assessment of damages to be heard and tried betwixt Samuel J. Dow and The Electric Company.

Hereof fail not, as you will answer your default under the penalties prescribed by law.

Dated at Manchester, N. H., Sept. 25, 1893.

ALBERT O. BROWN,
Justice of the Peace.

[Endorsed:] Hillsborough, *ss:* October 4, 1893. I this day summoned the within-named Sheehan and Hayes and tendered them three and $\frac{41}{100}$ dollars for their travel and attendance. Geo. H. Warren. Fees, summoning & travel, .74. Hillsborough, *ss:* Oct. 4th, 1893. Subscribed and sworn to before me. Albert O. Brown, justice of the peace.

32 HILLSBOROUGH, *ss:*

Supreme Court, Sept. Term, 1894.

SAMUEL J. DOW }
v. }
THE ELECTRIC COMPANY. }

The defendant objects to the addition of the fifty per cent. by the court to the verdict of the jury because the statute authorizing this is in contravention of the Constitution of the United States as follows, viz:

It violates the provision of article fifth of the amendment which provides that "no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

It violates also article 7th of the same amendment, which provides that "in suits at common law, when the value in controversy exceed- twenty dollars, the right of trial by jury shall be preserved."

Also it violates section one of the 14th amendment, which provides: "Nor shall any State deprive any person of life, liberty, or

property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

THE ELECTRIC CO.,
By its att'ys, SULLOWAY & TOPLIFF &
DAVID CROSS.

[Endorsed:] Samuel J. Dow *v.* Electric Company. Dow *v.* Electric Co. Def.'s objections to adding 50 %. Filed Sept. 25, '94.

33 STATE OF NEW HAMPSHIRE, }
Hillsborough, } *ss:*

I, Thomas D. Luce, clerk of the supreme court of the State of New Hampshire for the county of Hillsborough, do hereby certify that the foregoing is a true copy of the record in said action and of all papers on file in said cause, said court being the highest court of law or equity of the said State in which a decision could be had in the said cause.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court this 15th day of March, A. D. 1895.

[Seal Supreme Court, New Hampshire.]

THOS. D. LUCE, *Clerk.*

I, Charles Doe, chief justice of the supreme court of the State of New Hampshire, do certify that Thomas D. Luce, Esquire, whose signature is affixed to the foregoing certificate, is clerk of said supreme court for the county of Hillsborough, and hath the keeping of the files, records, and proceedings of said court, and also of the files and records of the supreme judicial court, the court of common pleas, the superior court of judicature, and the circuit court, heretofore existing in this State, and is by law the proper person to make out and certify copies thereof, and that full faith and credit are and ought to be given to his acts and attestations done as aforesaid, and that his attestation above written is in due form, said court being the highest court of law or equity of the said State in which a decision could be had in the said cause.

In testimony whereof I have hereunto set my hand and caused the seal of the said supreme court to be hereunto affixed this 15th day of March, A. D. 1895.

[Seal Supreme Court, New Hampshire.]

CH'S DOE.

34 UNITED STATES OF AMERICA, }
State of New Hampshire. }

To the Honorable Chas. Doe, chief justice of the supreme court of the State of New Hampshire:

Petition of the Electric Company, a corporation duly established by the laws of the State of New Hampshire, doing business at Manchester, in the county of Hillsborough, in said State, respectfully shows that it is and has been for more than three years past the owner and occupant of certain real estate on both sides of the Piscataquog river at Kelly's falls, so called, in said Manchester, in-

cluding the river and falls, and there erected a mill and placed wheels and machinery for the purpose of manufacturing or generating electricity to furnish light and power for houses, stores and mills, and people in said city of Manchester, and, for the purpose of rendering the water power of the said river at said falls available, constructed a dam across said river and placed flash-boards thereon; that the construction of said mill and dam and placing flash-boards upon said dam to raise the water for working said mill and machinery therein and for creating a reservoir and thereby flowing the land of said Dow was and is of public use and benefit to the people of the State of New Hampshire; that upon proceedings taken by the parties in the courts of the said State of New Hampshire, to wit, at the trial term of the supreme court in the county of Hillsborough, in said State, under what is known as the flowage act, as found in the Public Statutes of said State, chapter 142, sections 12, 13, 14, 15, 16, & 17, a copy of which is hereto annexed, a verdict was returned by the jury for fifteen hundred dollars damages, and that the said Dow moved for an addition of 50 % by the court in accordance with the statute; that thereupon the questions of law as raised by the said parties were transferred to the law term of said State, and that the said supreme court at its law term rendered its decision overruling the objections of said Electric Company and deciding that the addition of 50% to the verdict of the jury as authorized by said statute is not in conflict with either the Federal or State constitutions, and thereafter, to wit, December 31, 1894, the said supreme court, at its September trial term, 1894, entered judgment for $2,416.50, being $1,500.00 as found by the verdict of the jury, and also 50% added by the court, and also for costs of suit.

The proceedings of the aforesaid parties upon the trial and the verdict by the jury and transfer of the questions of law which arose upon the trial and the decision of the law before the law term of the said court were before the highest court of said State in which a decision in said case could be had, and the judgment is final so far as the laws and courts of New Hampshire are concerned. All of the aforesaid allegations or facts in detail appear in the records of this case, copies of which are herewith submitted.

THE ELECTRIC COMPANY,
By its att'y, DAVID CROSS.

The said Electric Company claims that error in law appears of record in this case, and makes the following—

Assignment of Errors.

The statutes under which the proceedings for flowing land — a mill-owner may flow the land of another provides as a prerequisite that the flowing of such land is or may be of public use or benefit to the people of said State, and the said Electric Company says that the said statute of New Hampshire under which the court of said State added 50% to the verdict, as appears in the record and copies

thereof hereto annexed, is in contravention of the Constitution of the United States as follows:

First. It violates the provision of article fifth of the amendment which provides that "no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

Second. It violates also article 7th of the same amendment, which provides that "in suits at common law, when the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved."

Third. Also it violates section 1 of the 14th amendment, which provides: "Nor shall any State deprive any person of life,
36 liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

THE ELECTRIC COMPANY,
By its att'y, DAVID CROSS.

Feb. 4, 1895.—Ordered that a writ of error issue according to foregoing petition.

C. DOE,
Chief Justice of the Supreme Court of New Hampshire.

37 UNITED STATES OF AMERICA, *ss:*

To Joseph A. Dow, of Manchester, county of Hillsborough and State of New Hampshire, administrator of Samuel J. Dow, late of Goffstown, in said county of Hillsborough, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New Hampshire for the county of Hillsborough, wherein The Electric Company, a corporation duly established by the laws of said State, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles Doe, chief justice of the supreme court of New Hampshire, this fifteenth day of March, in the year of our Lord one thousand eight hundred and ninety-five.

C. DOE,
Chief Justice of the Supreme Court of New Hampshire.

37½ [Endorsed:] Citation. Dow *v.* Electric Co.

On this sixteenth day of March, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared F. T. E. Richardson before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Joseph A. Dow.

FRANK T. E. RICHARDSON.

Sworn to and subscribed the 19th day of March, A. D. 1895, before me—

DAVID CROSS,
Justice of the Peace.

Fees.

Copy	2 00
Serv.	50
Trav.	24
	$2 74

38 STATE OF NEW HAMPSHIRE, *Hillsborough,* } ss:

I, Thos. D. Luce, clerk of the supreme court within and for said county of Hillsborough, hereby certify that the foregoing are true copies of:

I. The writ of error and

II. The return thereon.

III. The record in the case of Joseph A. Dow, adm'r of the estate of Samuel J. Dow, against The Electric Company.

IV. The application for writ of error and

V. The assignment of errors.

VI. And of all the proceedings in said case, with all things concerning the same, together with

VII. The original citation and

VIII. The evidence of service thereon.

In witness whereof I have hereto set my hand and affixed the seal of said supreme court this twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-five.

THOS. D. LUCE, *Clerk.*

39 Know all men by these presents that The Electric Company, a corporation duly established by the laws of the State of New Hampshire, doing business at Manchester, in said State, as principal, and George A. Leighton, Robie Whitney, and Eugene S. Whitney, all of Manchester aforesaid, sureties, are held and firmly bound to Joseph A. Dow, of Manchester aforesaid, as administrator of Samuel J. Dow, late of Goffstown, county of Hillsborough, in said State, deceased, in the sum of five thousand and six hundred dollars, to be paid to said administrator in his said capacity or his successor; to the payment whereof the said corporation binds itself, and the said sureties, jointly and severally, bind themselves and their heirs, firmly by these presents.

Sealed with our seals and dated the 25th day of January, A. D. 1895.

The condition of this obligation is that whereas, in a petition to the supreme court in and for the aforesaid county of Hillsborough by Samuel J. Dow in his lifetime against said Electric Company for the recovery of damages caused by the flowing of the land of said Dow by said corporation, the said Dow, by his said adminis-

trator, December 31, 1894, recovered a judgment of two thousand four hundred sixteen dollars and fifty cents, damages, and costs of suit, taxed at one hundred seventy-three dollars and twenty-one cents; and whereas the said Electric Co. has applied for a writ of error to the Supreme Court of the United States: Now, if a writ of error shall be granted and if said Electric Company shall prosecute its said writ in said United States Supreme Court and pay all such damages and costs as shall be awarded by the said United States Supreme Court and by the supreme court of the State of New Hampshire after the decision upon questions raised in said United States court, then this obligation shall be void.

THE ELECTRIC CO.,
By GEO. A. LEIGHTON, *Treasurer.* [SEAL.]
GEO. A. LEIGHTON.
ROBIE WHITNEY. [SEAL.]
EUGENE S. WHITNEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
BERTHA E. EASTMAN.

Approved:
C. DOE,
Chief Justice of said Supreme Court of New Hampshire.

(Filing:) Bond on writ of error. Dow *v.* Electric Co. Filed Feb 4, 1895.

Endorsed on cover: Case No. 15,863. New Hampshire supreme court. Term No., 258. The Electric Company, plaintiff in error, *vs.* Joseph A. Dow, administrator of Samuel J. Dow, deceased. Filed April 8th, 1895.

166-189
166748

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 258.

Office Supreme Court, U. S.
FILED.
MAR 24 1897
JAMES H. MCKENNEY

THE ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH A. DOW, ADMINISTRATOR OF SAMUEL J. DOW, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

BRIEF OF PLAINTIFF IN ERROR BY DAVID CROSS.

MANCHESTER, N. H.
PRINTED BY THE JOHN B. CLARKE COMPANY.
1897.

Supreme Court United States.

NO. 258, OCTOBER TERM, 1896.

THE ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH A. DOW, ADMINISTRATOR OF SAMUEL J. DOW, DECEASED.

Appeal from the Supreme Court of New Hampshire.

BRIEF OF PLAINTIFF IN ERROR,

BY DAVID CROSS.

STATEMENT OF FACTS.

This is a writ of error to reverse so much of a judgment of the supreme court of New Hampshire, against the plaintiff in error, as relates to the addition of fifty (50) per cent by the court to the verdict found by the jury. The plaintiff in error claims that such addition is unconstitutional.

The plaintiff in error was, and is, a corporation doing business in Manchester, N. H., in the manufacture for, and supply of the people of the city of Manchester, with electric light and power, and for that purpose built a dam upon its own land, across the Piscataquog river in said Manchester, and flowed the land of the defendant in error.

The defendant in error, in August, 1891, filed a petition in the supreme court for Hillsborough county, praying for the assessment of past, present, and future damages for his land flowed. Subsequently, to wit, in 1892, the Electric Company filed a petition alleging that it had placed flash-boards upon the dam, since the filing of said Dow's petition, and prayed that there be one assessment for damages caused by the dam and flash-boards. There was a trial by jury and verdict for Dow. Dow moved that fifty (50) per cent be added to the verdict, and judgment be rendered thereon.

The Electric Company objected to the addition of fifty (50) per cent, and filed the following as its objections :

The defendant objects to the addition of the fifty per cent by the court to the verdict of the jury because the statute authorizing this is in contravention of the Constitution of the United States as follows, viz :

It violates the provision of article five of the amendment, which provides that " no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

It violates also article seven of the same amendment, which provides that " in suits at common law, when the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved."

Also it violates section one of the fourteenth amendment, which provides " nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The supreme court of New Hampshire, being the highest court of said state, decided at its law term that the addition of fifty (50) per cent by the court to the verdict of the jury is not in conflict with either the state or the United States constitutions. The court further held that this question was not open to the Electric Company, as appears in the decision.

The act of the legislature of New Hampshire, under which these petitions were filed, was passed in 1868, a full copy of which appears in Head v. Amoskeag Manufacturing Co., 113 U. S. page 10. The revisions of the statutes of 1876, under title of General Laws, and of 1891, under title of Public Statutes, retain the same provisions, that when the jury have returned a verdict for damages, the court shall add fifty (50) per cent to the verdict, and enter judgment thereon.

In Head v. Amoskeag Manufacturing Co., the court held that the flowing of land by mill owners, according to the act of 1868, was constitutional. No question as to the addition of fifty (50) per cent to the verdict for damages was raised or suggested in that case. The act provides that any person or corporation may erect a dam upon his own premises, and if the land of any person should be overflowed or injured by the use of such dam, either party may petition to the supreme court to have the damage that may have been done, or may be done thereby, assessed. The court may appoint a committee to assess the damages, or either party has the right of trial by jury. If the parties agree to a committee, "and, if they (the committee) shall be of opinion that the flowing or draining of the land, to the depth and extent that the same may, or can be, flowed by the dam, is or may be of public use or benefit to the people of this state, and that the same is necessary for the use of the mill or mills for which the dam is designed, they shall estimate the damages and make report to the court, at the next term thereof, after the view and estimate."

Section 16. Public Statutes. "Upon the return of the report, any person interested therein may object to its acceptance for any irregularity or improper conduct on the part of the committee, and the court may set it aside for any just and reasonable cause, and, if required, shall inquire for itself, whether the erection of the dam is of public use or benefit, any finding of the committee upon that point notwithstanding; and if the court shall be of opinion that the erection of the

dam is not of public use or benefit, the petition shall be dismissed, but if the report shall be accepted and established, the court shall render judgment thereon, after adding fifty (50) per cent to the estimate of damage."

Sect. 17. "Before the reference of such petition to the committee, if either party shall so elect, the court shall direct an issue to the jury to try the facts alleged in the petition, and to assess the damages; and judgment shall be rendered on the verdict of the jury, with fifty (50) per cent added."

The plaintiff in error claims as follows:

This addition of fifty (50) per cent to the damages found by the jury is a violation of the fourteenth amendment of the constitution of the United States, because,

First; It is contrary to all other statutes of the kind in every state of the United States, contrary to the fundamental principles of the common law in making up a judgment on the verdict of a jury in civil cases. It is not due process of law.

Second; It allows a jury to give "full compensation," "just compensation," and then compels the court to add fifty (50) per cent more.

Third; It arbitrarily takes from the mill owner and gives to the landowner property without consideration.

Fourth; In the words of the amendment, it does not afford "the equal protection of the laws." It discriminates between the mill owner as a class, and all other persons, and all other classes.

Fifth; It imposes a penalty upon the mill owner for an act which, in the language of the statute, is for the public benefit.

Sixth; The reasons assigned by the supreme court of New Hampshire, in regard to a waiver, are not valid.

ARGUMENT.

First, as to legislation:

"In New Hampshire the legislature of the province, in 1718, passed an act for the most part copied from the Massachusetts act, from 1714, authorizing the owners of mills to flow lands of others, *paying damages assessed by the jury.*" See Head v. Amoskeag Manufacturing Co., 113 U. S. 20.

In 1810, (MS. Acts of 1810, in the office of the secretary of state, page 348), a charter was granted to Jonas Warren *et al.* to build a dam and mills on the Connecticut river, between Littleton and Waterford, containing this proviso:

"Provided, likewise, that the dam shall not be constructed so as to obstruct the passage of lumber in said river, nor flow any land to the damage of the owner thereof, without paying a *reasonable compensation* therefor."

We give also a small portion of the cases in which the state has passed laws giving the right to flow land, by paying reasonable compensation and as the jury shall award.

N. H. Turnpike, 1796; Portsmouth Aqueduct, 1797; Exeter Aqueduct, 1801; Tenth N. H. Turnpike, 1803; Charlestown Turnpike, 1803; Londonderry Turnpike, 1804; White River Falls Co., 1807; Dover Aqueduct Co., July 2, 1823; Grafton Canal Co., Dec. 10, 1824; Winnipisseogee and Piscataqua Canal Co., Dec. 16, 1824; Conn. River Navigation Act, 1826, p. 117; Merrimack Locks and Canals, 1827, p. 235; N. H. Canal and Steamboat Co., 1827, p. 240; Conn. River Canal, 1828, p. 325; John's River Canal Co., 1836, p. 319; Dead R. Lumbering Co., 1836, p. 331; Umbagog Co., 1837, p. 343; Gilbert's Bridge Co., 1839, p. 452; Pemigewasset Boom, 1844, p. 212; Piscataqua Aqueduct, 1846, p. 437; Androscoggin Boom Co., 1851, p. 1143; Belknap Aqueduct, 1851, p. 1146; Androscoggin R. Improvement Co., 1852, p. 1191; Mountains Carriage Railway, 1858, ch. 2157;

Mt. W. Summit Road Co., 1859, ch. 2314; N. H. Bridge, 1859, ch. 2313; Keene Water Works, 1861, ch. 2545; Amoskeag Man. Co., 1861, ch. 2548.

The important point in referring to these acts of legislation is, that in every act there is a provision made that the mill owner, or the person or corporation who uses the land of another under the principle of eminent domain, should pay *reasonable compensation for damages*. No statute was passed in New Hampshire, until this one of 1868, which allowed anything beyond damages assessed by a jury, or by a tribunal agreed upon.

In 1893, the legislature repealed this part of the law, allowing fifty (50) per cent additional to the verdict of the jury. See chapter 50 of the Laws of 1893.

In Head v. Amoskeag Manufacturing Co., before referred to, on page 16, the court says, "General mill acts exist in a great majority of the states of the Union;" and the court, on pages 17 and 18, gives the names of twenty-nine states where such flowage acts still exist.

The mill acts are also enumerated in a note to Gould on Waters (second edition), section 592. We submit that there has never been, and is not now in any state, any act of a legislature that has allowed damages to be assessed, except such as found by the jury or by some agreed tribunal. No state has passed a law adding a per cent to the compensation for damages found by verdict of the jury, except in this instance in New Hampshire.

We submit further that "*due process of law*," or "*the law of the land*" in reference to damages allowed under the law of eminent domain, or the taking land and using it for public benefit, as interpreted by statutes, and the common law is, that the amount determined by the jury is "full compensation" and "just compensation," and the only amount upon which judgment can be constitutionally returned.

A material point in this act is that part which reads:

"That the court if required shall inquire for itself whether

the erection of the dam is of public use or benefit; and if the court shall be of opinion that the erection of the dam is not of public use or benefit, the petition shall be dismissed."

No mill owner under this act has the right to maintain a dam and flow the land of another, unless the maintaining of such dam shall be of public use and benefit.

The legislature places the right of a mill owner to flow the land of another upon the general principle of eminent domain; the same as the right to take land for public highways and public buildings. No statute or law can be found which allows a judgment greater than the verdict of a jury for using land for public highways and other public objects.

We call attention to the title of the act, which is, "An Act for the Encouragement of Manufactures." It must be taken for granted that the legislature intended the ordinary meaning of these words, and intended to pass a law in some way more favorable to manufacturing than had hitherto existed. It intended to invite capital to New Hampshire for the increase of manufactures in the state and for public benefit. If the addition of fifty (50) per cent is constitutional and legal, the title of the act is a falsehood, because it requires the mill owner to pay fifty (50) per cent more for flowing land than has ever been paid before. The legislature went to the extent of its power upon the question of damages, when it declared that they should be assessed by a committee or by the jury.

The mill owner has the right to say that so much of the law as directs the court to impose a penalty upon him for doing a lawful act, is unjust and unconstitutional. He has a right to insist that in paying damages for the use of land, under the law of eminent domain, the judgment of the jury is to decide what the damages are. He has the right to say that when the law directs the court to add fifty (50) per cent to the verdict of the jury, *it takes fifty (50) per cent from him and gives it to the landowner, without consideration.*

The law, in effect, pays the landowner "just compensation,"

Mt. W. Summit Road Co., 1859, ch. 2314; N. H. Bridge, 1859, ch. 2313; Keene Water Works, 1861, ch. 2545; Amoskeag Man. Co., 1861, ch. 2548.

The important point in referring to these acts of legislation is, that in every act there is a provision made that the mill owner, or the person or corporation who uses the land of another under the principle of eminent domain, should pay *reasonable compensation for damages*. No statute was passed in New Hampshire, until this one of 1868, which allowed anything beyond damages assessed by a jury, or by a tribunal agreed upon.

In 1893, the legislature repealed this part of the law, allowing fifty (50) per cent additional to the verdict of the jury. See chapter 50 of the Laws of 1893.

In Head v. Amoskeag Manufacturing Co., before referred to, on page 16, the court says, "General mill acts exist in a great majority of the states of the Union;" and the court, on pages 17 and 18, gives the names of twenty-nine states where such flowage acts still exist.

The mill acts are also enumerated in a note to Gould on Waters (second edition), section 592. We submit that there has never been, and is not now in any state, any act of a legislature that has allowed damages to be assessed, except such as found by the jury or by some agreed tribunal. No state has passed a law adding a per cent to the compensation for damages found by verdict of the jury, except in this instance in New Hampshire.

We submit further that "*due process of law*," or "*the law of the land*" in reference to damages allowed under the law of eminent domain, or the taking land and using it for public benefit, as interpreted by statutes, and the common law is, that the amount determined by the jury is "full compensation" and "just compensation," and the only amount upon which judgment can be constitutionally returned.

A material point in this act is that part which reads:

"That the court if required shall inquire for itself whether

the erection of the dam is of public use or benefit; and if the court shall be of opinion that the erection of the dam is not of public use or benefit, the petition shall be dismissed."

No mill owner under this act has the right to maintain a dam and flow the land of another, unless the maintaining of such dam shall be of public use and benefit.

The legislature places the right of a mill owner to flow the land of another upon the general principle of eminent domain; the same as the right to take land for public highways and public buildings. No statute or law can be found which allows a judgment greater than the verdict of a jury for using land for public highways and other public objects.

We call attention to the title of the act, which is, "An Act for the Encouragement of Manufactures." It must be taken for granted that the legislature intended the ordinary meaning of these words, and intended to pass a law in some way more favorable to manufacturing than had hitherto existed. It intended to invite capital to New Hampshire for the increase of manufactures in the state and for public benefit. If the addition of fifty (50) per cent is constitutional and legal, the title of the act is a falsehood, because it requires the mill owner to pay fifty (50) per cent more for flowing land than has ever been paid before. The legislature went to the extent of its power upon the question of damages, when it declared that they should be assessed by a committee or by the jury.

The mill owner has the right to say that so much of the law as directs the court to impose a penalty upon him for doing a lawful act, is unjust and unconstitutional. He has a right to insist that in paying damages for the use of land, under the law of eminent domain, the judgment of the jury is to decide what the damages are. He has the right to say that when the law directs the court to add fifty (50) per cent to the verdict of the jury, *it takes fifty* (50) *per cent from him and gives it to the landowner, without consideration.*

The law, in effect, pays the landowner "just compensation,"

"full compensation,"— such compensation as has been sanctioned for all past time,— and then compels him to pay fifty (50) per cent more. This law holds out the encouragement to mill owners and manufacturers to build mills and flow land, but says: "That the man who does it shall be punished by the addition of fifty (50) per cent above what he ought to pay for damages caused to the landowner." This law says: "That the man who does so build dam and mills is serving the public and conferring a public benefit, but he should be punished by a penalty for so serving the public."

THE DECISION OF THE COURT IN NEW HAMPSHIRE.

The New Hampshire court decided that the addition of fifty (50) per cent to the verdict of the jury is not in conflict with either the state or United States constitution. We call special attention, however, to the fact that the court gives no reason for such opinion, and refers to no decision. The decision seems to be based entirely upon the grounds of waiver by the Electric Company.

The court says: "The defendants were authorized to flow the plaintiff's land upon the condition, among others, that they pay the damages thereby done to him, and fifty (50) per cent in addition; the statute is permissive. It confers the privilege, which the defendants were at liberty to exercise or not, as they saw fit. The question of its constitutionality, under either the federal or state constitution, is not open to them." The court cites two cases in New Hampshire, one in Massachusetts, and one in New York. We submit that neither of these cases sustains the position of the court.

In the Massachusetts case of Pitkin v. Springfield, the mayor and aldermen laid out a street and awarded damages at the date of the location, in 1868. In another case it had been decided that the proceedings of the city, in locating such streets, were void, and the legislature, in 1870, passed an act legalizing the location of such streets and taking land. In 1871 the landowner petitioned for damages, contending that

she should be awarded for the value of the land, as it was in 1870, at the time of the passage of the act of the legislature legalizing the location. The petitioner contended that it was unconstitutional to have damages assessed at the date of the actual taking of the land, in 1868, and the court held that by applying for a jury under this statute, the petitioner admitted the validity of the location, and the assessment of the damages at the date of the taking of the land, in 1868, and the question of constitutionality of the statute of 1870 was not open.

In the other cases referred to, the waiver relates to the tribunal, and the decisions reiterate the general principle, that when a person has the choice of one or more tribunals, and applies for redress, he cannot afterwards object to the jurisdiction of such tribunal.

Deverson v. R. R., 58 N. H. 131, relates to a statute of the state, providing for the trial of certain cases by referee, reserving the right of trial by jury, and providing that the referee's report should be competent evidence before the jury. The court decided that the parties, having elected to try the case first before a referee, with the privilege afterwards of going to the jury, must take the whole of the act in consideration, and allow the referee's report to be read to the jury.

Dodge v. Stickney, 61 N. H. 607, relates merely to the payment of fees, where the statute of the state had provided the tribunal for the trial of the case, and the party had selected the tribunal, where the law obliged him to pay the referee for services. The court held that the party having selected the tribunal must pay the fees according to the terms of the statute.

The case of People v. Murray, 5 Hill 468, was an action upon a bond on the appeal in the sum of ten thousand ($10,000) dollars, in pursuance of an act to authorize the erection of a dam across the Genesee river. The bond was conditioned to pay such damages as might be awarded by the tribunal

provided in the act. The court held that the defendants took the grant to build the dam, with the condition attached to it. "It was competent for them to waive the right of trial according to the common law."

In the case at bar, we do not object to the assessment of the damages by the jury, but we contend that when the jury has returned its verdict, that is the end of the case, so far as the amount of damages is concerned.

A STATUTE MAY BE CONSTITUTIONAL IN PART AND UNCONSTITUTIONAL IN PART.

Lewis on Eminent Domain, Section 461.
Penn. R. R. Co. v. Balt. & Ohio R. R. Co., 60 Md. 263.
Commonwealth v. P. & C. R. R. Co., 50 Penn. St. 26.
Vol. 3, Encyclopedia of Law 676, and cases cited.
Packet Co. v. Keokuk, 95 U. S. 80.
Unity v. Bronge, 103 U. S. 459.
Presser v. Ill., 116 U. S. 252.

We contend further that when a portion of an act is unconstitutional, parties have the right to have the law administered upon the part constitutional, and that the other part should be disregarded. An unconstitutional law is no law.

In Cooley's Constitutional Limitations, (6th edition, 222), it is said, "When a statute is judged to be unconstitutional, it is as though it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made, and what is true of an act void in toto, is true also as to *any part of an act* which is found to be unconstitutional and which consequently is to be regarded as having never at any time been possessed of any legal force." These principles, we submit, are elementary and need no further authorities.

The court in King v. Hopkins, 57 N. H. 352 and 353 say, "Jury trial is a remedy, and remedies may be altered by the legislature, therefore, the legislature may alter jury trial to any extent"! That is the kind of syllogism which puts the argument in a definite shape. The trouble is, the proposition that remedies may be altered by the legislature is subject to the supreme qualification, that no constitutional right can be infringed by any alteration of remedies. Some superficial people have cheated themselves by a verbal distinction between rights and remedies, when the constitution recognizes no such distinction. Whatever we may mean by remedy in any particular cases, the legislature cannot deprive parties of any right or any remedy secured to them by the constitution. The legislative power is a power of making constitutional laws."

We cite other authorities and reasons for the unconstitutionality of the portion of the law adding fifty (50) per cent, as follows:

In 60 Mo. 62, Barnet v. Atlantic & Pacific R. R., in discussing the statute giving double damages for the killing of cattle by the railroad, it is said, "It is manifest that if this statute can be maintained at all, it must be maintained upon the ground that it is a penal statute. Parties civilly injured are by way of recompense entitled to full and adequate compensation for all the damages sustained by them, and an act of the legislature which should provide that in all civil actions the plaintiff should recover twice the amount of the damages actually sustained by him, would undoubtedly be declared as unconstitutional and void."

In Millett v. People, 117 Ill. 294, it is said, "Due process of law means the same as the law of the land, which means public general law, binding upon all members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals."

The court in Mo. Pacific R. R. v. Hines, 115 U. S. page 525 says, "The statutes of nearly every state of the Union pro-

vide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases thribble and even quadruple. The injury actually received is often so small that in many cases no effort could be made by the sufferer to obtain redress, if the private interests are not supported by the imposition of punitive damages." "In many states statutes impose double damages upon railroads for the neglect to provide fences, whereby cattle are killed, and the law is sustained under the police power of the constitution, because the imposition of double damages is for criminal neglect and for the protection of the public."

The Minneapolis St. Louis R. R. v. Beckwith, 129 U. S., is a discussion of the propriety and legality of the imposition of punitive damages for the violation of duty, and it is held that the imposition of double damages is not in conflict with the 14th amendment to the constitution, because it is one mode of imposing a penalty for the violation of duty, and the court says, "Experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries."

We contend further, that any statute which imposes the payment of any sum above the verdict of a jury, must be brought within the principle of punishing for injuries or protecting the public from wrong.

In the Civil Rights Cases, 109 U. S. page 11, it is said, "That the prohibitions under the 14th amendment are against state laws and acts, done under state authority. This amendment nullifies and makes void all state legislation and state action of every kind, which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty, or property, without due process of law, or which denies to any of them the equal protection of the laws."

In Davidson v. New Orleans, 96 U. S. 107, in discussing the words "due process of law," it is said, "If state legislation

is found to be arbitrarily oppressive and unjust, it may be declared not to be due process of law."

In Boom Co. v. Patterson, 98 U. S., the head note reads in part, "In determining the value of lands appropriated for public purposes, the same considerations are to be regarded as in a sale between private parties; inquiry in such cases being what from their availibility for valuable uses are they worth in the market. As a general rule compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

In Mills on Eminent Domain, Section 85, it is said, "The sovereign cannot assess the damages in a case of condemnation by himself, nor can the state by legislature fix the amount to be paid. An arbitrary schedule of prices to be paid cannot be established, but there must be a fair appraisement by an independent tribunal."

The addition of fifty (50) per cent to the verdict denies to mill-owners, as a class, the equal protection of the laws.

A late case in point is Gulf, Col. & Santa Fe R. R. v. Ellis, decided January 18, 1897, reported in advance sheets, February 15, 1897, where Mr. Justice Brewer said: "Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them, which is not imposed upon others guilty of like delinquency, the statute in question in that case cannot be sustained. Unequal, partial, and discriminatory legislation which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection, designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions, (the 14th amendment among others). It is apparent that the mere fact of classification is not sufficient to relieve a statute from the

reach of the equality clause of the 14th amendment, and that in all cases, it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which appears a just and proper relation to the admitted classification, and is not an arbitrary selection."

By the laws of the land, we understand laws that are general in their operation and that affect the rights of all alike, and not a special act of the legislature, formed to affect an individual or class and in a way in which the same rights of other persons are not affected by existing laws.

In Garrison v. City of New York, 21 Wallace 204, it is said, "The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the state, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, *but to the public which is to pay for it.*

It has come to be an elementary principle that no land can be taken for public use without "just compensation." In Lewis on Eminent Domain, section 462, the meaning of the phrase "just compensation" is stated as follows: "The etymology of the word 'compensation' presents the idea of balancing one thing against another. To compensate is to render something which is equal to that taken or received. The word 'just' was not intended to have a mere literal meaning as opposed to unjust, but as placing the matter upon a broad and equitable basis. It is difficult to imagine an unjust compensation, but the word 'just' is used evidently to intensify the meaning of the word 'compensation,' to convey the idea that the equivalent rendered for the property taken shall be real, substantial, full, ample; and no legislature can diminish by one jot the rotund expression of the constitution. Just compensation, therefore, as used in the constitution, means a fair and full equivalent for the loss sustained by the

taking of land for public use. It may be more or it may be less than the mere money value of the property actually taken. The exercise of the power being necessary for the public good, and all property being held subject to its exercise when and as the public good requires it, it would be unjust to the public that it should be required to pay the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general good."

In State v. Hodge, 50 N. H. 524, it is said: "To whatever extent the matter of fact involved in the issue is held to be matter of law, to that extent the constitutional system of trial by jury is destroyed, and when part is destroyed the remainder is put in jeopardy. One precedent is held to justify another. Every matter of fact turned into law opens a way for a further annexation of the province of the jury to the province of the court, and a gradual absorption."

Bay City and E. S. R. R. Co. v. Austin, 21 Mich. 410, was an action to recover damages for injuries caused by railroad's neglect to maintain fences. The statute authorized the jury to assess the damages, and the court to give judgment for double the amount. The court says: "No authority exists at common law for increasing the recovery by multiplying the whole damages found by the jury, and it is not clearly perceived upon what principle the legislature can be justified in declaring that for the injury of the kind in question, a party shall be entitled to double the damages. The power to multiply the sum of the whole damages by two, implies the power to multiply by one hundred, and the excess, be it more or less, is so much beyond all the damages taken from one party and given to another. If, as between man and man in this case, having no element of wantonness, willfulness, or malice, the claims of moral justice are satisfied when the party at fault has paid all the damages, actual or presumed, it is impossible to regard the excess above single damages allowed by the act, in any other light than in the nature of a penalty, and a penalty not resting in contract, or given in lieu of damages, or as

the measure of redress to the complaining party, but imposed by legislative power for the purpose of punishment." The court in that case refers also to Merchants Bank v. Bliss, 13 Abbotts P. R. 225, S. C. Howard P. R. 365. See also

Seymour v. McCormick, 16 Howard 480–488.
Lewis v. Foster, 1 N. H. 61.
Cooley on Constitutional Limitations, 383.
Oriental Bank v. Freeze, 6 Shipley 9.
Welch v. Woodworth, 30 Conn. 149.
Barnett v. Atlantic & Pacific R. R. Co., 68 Mo. 56.

The last was an action to recover double damages under statute for killing cattle on railroad. The court on page 62 says: "It is manifest that if this statute can be maintained at all, it must be maintained upon the ground that it is a penal statute. Parties civilly injured are, by the way of recompense, entitled only to full and adequate compensation for all the damages sustained by them: and an act of the legislature which shall provide that in all civil actions the plaintiff should recover twice the amount of the damages actually sustained by him, would undoubtedly be declared unconstitutional and void."

C. & St. L. R. R. Co. v. Warrington, 92 Ill., was an action for killing a cow. The statute authorized double damages. The court, on page 162, says: "The act is constitutional because it is a forfeiture exacted for neglect of a duty imposed for the welfare and protection of the community from wrong or injury."

Atchison & Nebraska R. R. Co. v. Baty, 6 Neb. 37. Action to recover value of hogs accidentally killed by railroad. Statute authorized owner to recover double the value, if not paid thirty days after notice. Decided unconstitutional.

The court says it is unconstitutional because "it imposes a penalty for the purpose of punishment." "Also that it is partial, it imposes a different rule for corporations from indi-

viduals. The constitution says laws are to be founded upon established fixed rules for all alike." "It is not legislation which prescribes a rule contrary to the general law and orders it to be enforced."

"If the legislature has the power to impose double damages, then it has one hundred times. And the excess beyond the damages sustained, whatever it may be, is so much property taken from one person and given to another." Page 47: "Such legislation is repugnant to the fundamental principles of individual rights, the maxims of the common law, and the constitutional limitations, and therefore cannot be 'the law of the land.'" See, also, Cooley on Limitations, 392.

We suggest, further, upon the unreasonableness as well as unconstitutionality of this fifty per cent addition, an extract from an opinion of the court, 4th N. H. 566: "Here the power granted is a power to make all manner of laws and statutes which are wholesome, reasonable, and not repugnant to the constitution. It is, in its nature, a limited, restricted power. It is an old maxim of the common law of England that when an act of parliament is against common right and reason, the common law will control it and adjudge it void; and one object of this provision in our constitution was to adopt and confirm that maxim of the common law. An act of the legislature, in order to have the force of a statute, must, therefore, be neither repugnant to reason nor to the constitution."

H. E. LOVEREN,
Attorney.

DAVID CROSS, Manchester, N. H.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 258.

Office Supreme Court, U. S.
FILED.
MAR 31 1897
JAMES H. McKENNEY,

THE ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH A. DOW, ADMINISTRATOR OF SAMUEL J. DOW, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

BRIEF OF DEFENDANT IN ERROR.

MANCHESTER, N. H.
PRINTED BY THE JOHN B. CLARKE COMPANY.
1897.

Supreme Court United States.

NO. 258, OCTOBER TERM, 1896.

THE ELECTRIC COMPANY, PLAINTIFF IN ERROR,

VS.

JOSEPH A. DOW, ADMINISTRATOR OF SAMUEL J. DOW, DECEASED.

Appeal from the Supreme Court of New Hampshire.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error assigns four grounds for its appeal:

1. The proceeding is not due process of law.

2. It violates the provision against taking property for public use without compensation.

3. It violates the provision for jury trials.

4. It denies to the plaintiff in error the equal protection of the laws.

I.

Laws authorizing the recovery of double damages are not open to objection on the ground that they do not afford "due process of law."

Mo. Pac. R. Co. v. Humes, 115 U. S. 512.
Minn. & St. L. R. Co. v. Beckwith, 129 U. S. 26.

It is immaterial whether the addition to the actual damages is made by court or jury. It is a purely ministerial act, one which must give exactly the same results by whoever performed. The only part of the proceedings in which there could be any difference in result, is the original assessment of damages, and as to that the plaintiff in error had the benefit of a jury trial.

An assessment of damages by a committee is due process of law.

Pearson v. Yewdall, 95 U. S. 294.

"There exists some strange misconception of the scope of this provision as found in the fourteenth amendment. It seems to be looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." *Miller, J.*

Davidson v. New Orleans, 96 U. S. 97.

II.

"Nor shall private property be taken for public use without just compensation."

Fifth Amendment Constitution U. S.

This provision applies only to taking of property by authority of the United States. It has no application to

state laws. "The fifth amendment must be understood as restraining the powers of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively and with which others interfere no further than they are supposed to have a common interest." *Marshall, C. J.*

Barron v. The Mayor, etc., of Baltimore, 7 Pet. 243, 248.
Withers v. Buckley, 20 How. 84.

III.

The provision of the seventh amendment relating to jury trials applies only to proceedings in the United States courts.

Walker v. Sauvinet, 92 U. S. 90.
Pearson v. Yewdall, 95 U. S. 294.
Edwards v. Elliott, 21 Wal. 532.

IV.

It is difficult to understand what rights or property of the plaintiff in error have been infringed upon, whereby it claims equal protection has been denied to it. The long list of special acts cited in its brief show that the state legislature has granted certain privileges to certain specified persons or corporations. It will hardly be claimed that these grants gave this plaintiff in error the right to demand a grant of similar rights, and if they did not they have no significance here. The same suggestion applies to the claim that some constitutional right grows out of the fact that twenty-nine states have passed flowage acts, under which the mill owner need only compensate the land owner. The funda-

mental error in the plaintiff's position is that it assumes that it had certain rights to flow Dow's land. It had no such right apart from this statute. The legislature saw fit to offer to all mill owners the privilege of purchasing certain lands in a specified way. Before this time the company had neither the duty nor the right to take Dow's land. After this offer was made it saw fit to accept it, and then for the first time it had a "right" which might ripen into property. What was that right? Plainly to take the land for the price offered; that is, one and one half times its value. In other words, it is the act which gave the right which is complained against as infringing what it gave.

The act applies alike to all mill owners, and for this reason cannot be considered unequal in the constitutional sense. Special legislation is not open to this objection if all persons subject to it are treated alike.

"The rule of equality is not invaded when all corporations of the same kind are subject to like charges for similar services, although no charge at all is made against other corporations."—*Field, J.*

C. C. & A. R. Co. v. Gibbes, 142 U. S. 386.

"No discrimination is made against any particular railroad companies or corporations; all are treated alike and required to perform the same duty, and therefore no invasion was attempted of the equality of protection ordained by the fourteenth amendment."

Minn. St. L. R. Co. v. Emmons, 149 U. S. 364, 367.

"When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. . . . .

As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches, and to persons and corporations using steam in manufactories."

Mo. Pac. R. Co. v. Mackey, 127 U. S. 205.

In conclusion, we submit that the decision of the state court, quoted in the brief for the plaintiff in error, is correct. The company having elected to take the benefit of the statute cannot complain of the terms it imposed.

State v. Mitchell, 31 O. St. 592, 610.
Sherman v. McKeon, 38 N. Y. 266, 274.
Pool v. Breese, 114 Ill. 594.
Ellis v. White, 61 Ia. 644, 646.
Test v. Larsh, 76 Ind. 452.

HENRY M. BAKER,
Attorney.